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In The

Supreme Court of the United States

October Term, 1969

No. 985

STEPHEN DENNISON,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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Statement of Facts

The following memorandum is submitted in support of petitioner's application for a writ of certiorari to the Court of Appeals of the State of New York, and in reply to the brief in opposition submitted on behalf of the respondent.

Respondent's brief in opposition contains two points. We will attempt to answer these arguments seriatim.

Argument

POINT I

THERE IS NO REASON WHY THE DECISION OF THIS COURT IN BAXSTROM v. HEROLD SHOULD NOT BE RETROSPECTIVELY APPLIED.

This point has been dealt with at length in the original application for certiorari and there is little that need be added. Respondent, however, has asserted one argument which we feel is wholly without merit. It is claimed by respondent that the imposition of monetary damages because of changes brought about by a "growing and living law" will stunt the growth of the law and inhibit its life. This argument is based upon the premise that the growth in the law is brought about because the states consent to such changes. In fact, the opposite is true. The changes wrought in the law in recent years have been vigorously opposed by the states. The BAXSTROM decision itself was opposed in this Court by the State of New York. To decline to grant retroactivity to the application of the BAXSTROM decision would not result in less resistance to change in the law by the states.

POINT II

THE ARGUMENT MADE IN POINT I OF RESPONDENT'S BRIEF THAT NO SUBSTANTIAL CONSTITUTIONAL RIGHT OF PETITIONER WAS VIOLATED BECAUSE PETITIONER SUFFERED NO ACTIONABLE DAMAGES IS BASED UPON A MISAPPREHENSION OF THE DECISION OF THE COURT OF APPEALS ON THE MOTION TO AMEND THE REMITTITUR OR A MISSTATEMENT THEREOF.

In the second part of its brief, the State of New York asserts that the Constitutional issues raised by petitioner did not affect the determination of the Court of Appeals. On the motion to amend the remittitur (17a of the petition), the Court stated that it considered the Constitutional questions raised by petitioner and determined that petitioner had no right to damages "based on a retrospective application of BAXSTROM v. HEROLD."

The State attempts to make the point that the Court of Appeals should have determined this case without reaching the Constitutional issues on the theory that the wrong was committed by a judge who was an employee of a subdivision of the State rather than the State itself, and that in any event, the State is not liable for errors of its judiciary.

Had the Court of Appeals been able to decide this case without reaching the Constitutional issue, it would have done so. Indeed, the Court of Appeals itself observed in PETERS v. NEW YORK CITY HOUSING AUTHORITY, 307 N.Y. 519, 527, "It is

well settled that issues of constitutionality should not be decided before they need be."

The State of New York thus attempts to argue matters of State Law which apparently have been decided against it in the State Courts. The wrong perpetrated on petitioner in incarcerating him for more than 24 years under an unconstitutional Statute in a criminal hospital rather than a civil hospital was perpetrated by others than the judiciary of New York. In reaching the constitutional question involved, the Court of Appeals of New York has decided that the State of New York cannot avoid its liability on the theories advanced in the second point of respondent's brief. The State of New York was successful in the Court of Appeals because of the Court of Appeals' interpretation of the Constitutional issue by failing to give retrospective application to the BAXSTROM decision.

The matter raised in the second point of respondent's brief relates to matters of State law that this Court has no jurisdiction to hear.

The State of New York has obviously misapprehended the decision of the Court of Appeals on the motion to amend the remittitur. There the Court expressly stated that it "necessarily passed upon" claimant's argument that he should not have been retained under Section 384 of the Correction Law of New York which was subsequently declared unconstitutional in BAXSTROM. The Court rejected that argument only because it would not grant retrospective application to the BAXSTROM decision.

Conclusion

The petition for certiorari should be granted and the determination of the Court of Appeals of New York should be reversed.

Dated: New York, January 26, 1970.

Respectfully submitted,

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FILED
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(32-A)

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BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.